89-926

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MICHAEL R. McGEE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. SHOULD THIS COURT EXTEND ITS HOLDING IN *MICHIGAN V. SUMMERS* TO AUTHORIZE THE DETENTION OF ANY PERSON DRIVING A VEHICLE ASSOCIATED WITH A SUSPECTED DRUG HOUSE IF THAT VEHICLE IS BEING DRIVEN ON A PUBLIC STREET IN FRONT OF THE DRUG HOUSE DURING THE SEARCH OF THAT DRUG HOUSE PURSUANT TO A SEARCH WARRANT?

B. WHERE THE ONLY JUSTIFICATION GIVEN BY POLICE FOR A WARRANTLESS STOP OF A VEHICLE IS THE PROTECTION OF OTHER, HOUSE-SEARCHING OFFICERS; AND WHERE THE DRIVER OF THE VEHICLE IS UNKNOWN AND NEITHER THE DRIVER NOR THE VEHICLE IS OBVIOUSLY INVOLVED IN ILLEGAL ACTIVITY, DOES STOPPING A VEHICLE KNOWN TO BE ASSOCIATED WITH A SUSPECTED DRUG HOUSE IN THE MIDDLE OF A PUBLIC STREET DIRECTLY IN FRONT OF THAT DRUG HOUSE DURING A SEARCH OF THE HOUSE PURSUANT TO A SEARCH WARRANT CONSTITUTE AN "UNREASONABLE SEIZURE" OF THE VEHICLE-DRIVER IN CONTRAVENTION OF THE FOURTH AMENDMENT?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Michael R. McGee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on October 6, 1989.

I.

OPINIONS BELOW

The *REPORT AND RECOMMENDATION* of the Chief United States Magistrate for the Western Division of the United States District Court for the Western District of Missouri is attached as Appendix A; the *ORDER* of United States District Judge Dean Whipple is attached as Appendix B; the *PER CURIAM OPINION* of the United States Court of Appeals is attached as Appendix C. No Motion for Rehearing was filed.

II.

JURISDICTION

The PER CURIAM OPINION of the Court of Appeals for the Eighth Circuit was filed on October 6, 1989. The Jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. §1254 (1).

III.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure *in their persons*, houses, papers, and effects, *against unreasonable searches and seizures, shall not be violated*, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
>
> (Emphasis added to pertinent section)

IV.

STATEMENT OF FACTS

For a period of at least two weeks prior to April 26, 1988 members of the Kansas City Police Department conducted surveillance on a residence located at 4012 Clark, Kansas City, Missouri. The house came under surveillance and suspicion as a possible "safe house" for narcotics trafficking by members of a California street gang known as the "Bloods".

During the surveillance period, officers would periodically drive by the house, check for activity and watch individuals coming to and going from the house at 4012 Clark. On the basis of "intelligence information", several of those individuals were identified by police as members of the "Bloods".

Although the house at 4012 Clark saw relatively little activity, surveillance officers noted that a number of

autos, a half dozen or more, were at various times seen parked in the alley behind, or the street in front of, the house. One of those vehicles was a brown and black 1979 Chevrolet Blazer.

On April 26, 1988 police noticed an increase in the amount of activity occurring at 4012 Clark and determined that the time was right to enter and search the premises. At approximately 7:45 p.m., police secured a search warrant for the premises at 4012 Clark.

The search warrant affidavit submitted in support of the warrant identified and described as "Bloods" seven specific individuals. Five of these individuals were associated with 4012 Clark. NONE OF THEM WAS THE DEFENDANT!

The affidavit also described as belonging to or being used by suspected gang members at least four different vehicles. THE BROWN AND BLACK CHEVROLET BLAZER ON WHICH THIS APPEAL IS BASED WAS NOT AMONG THEM!

Although the affidavit described instances of prior contact between police and suspected "Bloods", including stops and arrests, no mention was made of any incidents of violence, arrest resistance or weapons possession by the alleged "Bloods".

The search warrant directed the search of the premises specifically described as "4012 Clark . . . a two story single family dwelling . . . ". It made no mention of appurtenances, adjacent areas and the like. Seizure of certain designated "property or things" was authorized only to the extent found "on the place described" in the

warrant. The "property or things" so designated included drugs, weapons, paraphernalia, cash and "[a]ny [o]ccupants".

The search warrant was executed at approximately 9:15 p.m. on April 26, 1988. After thoroughly searching the house, police found $70.00 cash and a .32 caliber handgun; THEY FOUND NO DRUGS! Of the two individuals found in the house at the time the police executed the warrant, at least one was identified and described in the search warrant affidavit. These individuals were unarmed and offered no resistance to their arrest by searching officers.

According to the police who testified at the hearing, there was concern for the safety of the officers executing the search warrant. Because of the number of persons coming and going at 4012 Clark on or about April 26th, the police were concerned that someone, knowingly or ignorantly, might attempt to enter the house during execution of the warrant. Because the police believed gang members to be armed, possibly dangerous and trafficking in large quantities of narcotics, they decided to use "extreme caution" during the search "so as not to create injury to civilians, officers or suspects themselves". One officer testifying at the evidentiary hearing mentioned that "the information from California" indicated that gang members have been known to engage in "drive-by" shootings where members (plural) of one gang shoot out of a passing car at members of a competing gang or "anybody that's a threat to their organization". No such assaults had occurred in the Kansas City area, however. All previous confrontations between suspected "Bloods" and Kansas City police being without incident.

Because of their concerns that a visitor to or occupant of 4012 Clark might interfere with execution of the search warrant, police established a "secondary surveillance" which would watch for "targeted vehicles" and warn officers at or near 4012 Clark if and when one of those vehicles approached. The "targeted" vehicles were those cars thought to be associated with the house or with suspected gang members. It is not clear whether the Blazer was specifically denominated as being in that group.

A "chase car", (an unmarked car with uniformed officers), was standing by "in close proximity (to the house) to . . . chase down any vehicles that were in the area that were known to be associated with that house."

Approximately twenty to thirty minutes BEFORE the police executed the search warrant, the Blazer, which had been parked in front of the house, was driven away from 4012 Clark. NO ONE IDENTIFIED THE DRIVER AT THAT TIME!

Although surveillance officers did not follow the Blazer when it left, other officers later observed the Blazer in Kansas City, Kansas. These officers kept a "tail" on the vehicle, continually radioing messages as to its whereabouts, until such time as it was stopped by police in the middle of the street directly in front of 4012 Clark. The record is silent as to whether or not the "tailing" officers ever identified the Blazer driver.

During the search of 4012 Clark a detective named Charles Michael McKinnie was in an unmarked police car at 39th and Clark conducting secondary surveillance. Shortly before the Blazer was stopped he saw it travelling

eastbound on 39th Street. He also saw it turn right onto Clark Street and head south toward 4012. DETECTIVE McKINNIE DID NOT SEE WHO WAS DRIVING THE BLAZER! He recognized the vehicle. He immediately radioed other officers warning them of the Blazer's approach. He ordered it stopped.

At the same time Detective McKinnie was conducting secondary surveillance at 39th and Clark, two Kansas City, Missouri police officers (Wranich and Smith) were manning an undercover "chase car", also at 39th and Clark. They received a radio transmission warning of the Blazer's approach and ordering it stopped. They immediately proceeded south on Clark Street and observed the Blazer travelling eastbound on 40th Street. Apparently there was concern that the Blazer would turn off of 40th Street and into an alley which ran behind 4012 Clark. The Blazer, however, continued eastbound, turning right onto Clark Street where it was stopped.

According to Wranich, who was driving the chase car, when the Blazer turned right onto Clark Street, he turned on the flashing red grill lights of the chase car, activated the siren and directed the spotlight into the Blazer's mirrors and interior. The Blazer stopped immediately, almost directly in front of 4012 Clark. There were no parking places on Clark Street near 4012 and the Blazer remained in the middle of the street in its lane of traffic; the chase car stopped directly behind it. AT THIS POINT THE BLAZER'S DRIVER STILL HAD NOT BEEN IDENTIFIED! NEITHER THE BLAZER NOR ITS DRIVER HAD BEEN SEEN DOING ANYTHING ILLEGAL!

Immediately after the stop Officers Wranich and Smith exited the chase car with weapons drawn; they aimed them at the defendant. As the officers approached the Blazer they ordered the defendant to put his hands in the air; the defendant complied. The uniformed officers (Wranich and Smith) positioned themselves on either side of the two-door vehicle. Wranich was pointing his handgun and Smith was aiming his shotgun at the defendant's head.

Wranich ordered the defendant out of the Blazer. In response, defendant moved his right hand down, outside of Wranich's line of sight. At about the time of Wranich's order another officer, Peltier, who had been inside 4012 Clark came outside. He had heard the radio dispatch ordering the chase car to stop the Blazer. Peltier saw what he described as the defendant trying to open and get his hand inside the console . . . as if "going for a weapon".

Officer Wranich, keeping his revolver pointed at defendant's head, opened the driver's door, and ordered the defendant to get his hands back up and get out of the car. Officer Wranich testified that the defendant exited the vehicle voluntarily. Officer Peltier testified that Wranich physically pulled the defendant out of the Blazer. Peltier and other officers who responded to assist in "taking (the defendant) out" arrived at the Blazer within moments of the stop, however, Wranich had already placed the defendant in a search position against the Blazer and was frisking him. According to Wranich, "another officer handcuffed (the defendant) . . . and he was placed into a vehicle and taken away". Other than making the alleged "furtive gesture" toward the console,

defendant did nothing suspicious or threatening. Defendant made no attempt to flee or to resist arrest.

Officers Wranich and Smith hastily returned to their surveillance location and continued to act as the "chase car" for targeted vehicles. Officer Peltier drove the Blazer further south on Clark Street to park it. He then searched the console and interior. Peltier found no weapons in the console nor anywhere else in the Blazer. However, in the console he found two clear plastic bags containing 52.7 grams of "crack" cocaine.

Defendant was transported downtown, jailed, and, the following day, questioned by Detective McKinnie. During this questioning, although denying any knowledge of the cocaine in the console, defendant allegedly admitted having previously transported narcotics in the Kansas City area for members of the "Bloods".

NEITHER DETECTIVE McKINNIE NOR OFFICER WRANICH NOR OFFICER SMITH SPECIFICALLY IDENTIFIED THE DEFENDANT, MICHAEL R. McGEE, AS THE DRIVER OF THE 1979 CHEVROLET BLAZER BEFORE IT WAS STOPPED! THROUGHOUT THE TESTIMONY THE OFFICERS WERE CONSISTENT IN MAINTAINING THAT THE ONLY REASON THEY STOPPED THE BLAZER WAS THAT IT WAS "KNOWN TO BE ASSOCIATED WITH" THE HOUSE LOCATED AT 4012 CLARK. EVERYONE AGREED THAT DEFENDANT HAD COMMITTED NO OBVIOUS CRIMES WHILE DRIVING THE BLAZER! NONE OF THE OFFICERS INVOLVED CLAIMED TO HAVE A REASONABLE ARTICULABLE SUSPICION THAT THE DEFENDANT WAS INVOLVED IN OR WAS ABOUT TO BE INVOLVED

IN THE COMMISSION OF A CRIME! THE SOLE JUSTIFICATION GIVEN FOR THE STOP OF "THE BLAZER" (AND ITS DRIVER) WAS THAT THE SECONDARY SURVEILLANCE OFFICERS FEARED FOR THE SAFETY OF THE OFFICERS ACTUALLY SEARCHING THE HOUSE!

V.

REASONS FOR GRANTING THE WRIT

A. THE EIGHTH CIRCUIT COURT OF APPEALS HAS SANCTIONED THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION, WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In his REPORT AND RECOMMENDATION to the District Court, Chief Magistrate Calvin K. Hamilton, in what appears to be a hybrid opinion using the "stop and frisk" doctrine set out in *Terry v. Ohio*, 392 U.S. 1 (1968) and the "public safety" doctrine espoused in *New York v. Quarles*, 467 U.S. 649 (1984), Magistrate Hamilton stated:

> "Based upon surveillance of the house for approximately two weeks prior to the execution of the search warrant and upon intelligence information compiled with regard to the operations at the house and the parties involved therein, the officers knew that narcotics were being trafficked through the house, that the occupants of the house, including the defendant,

> were associated with a violent Los Angeles street gang whose members were known to carry guns and traffic in narcotics, and that the vehicle driven by the defendant was associated with the house. The officers had a reasonable and articulable suspicion that the defendant was engaged in the illegal activity that was associated with the house and was returning to the house at the time he was stopped. *IN LIGHT OF THE FOREGOING CIRCUMSTANCES, THE OFFICERS WERE JUSTIFIED IN STOPPING THE DEFENDANT FOR THE SAFETY OF THEMSELVES AND THE SEARCHING OFFICERS AND OTHER PERSONS WHO WERE AT THAT TIME IN THE HOUSE.*" (emphasis added)

Chief Magistrate Hamilton's REPORT AND RECOMMENDATION was adopted in its entirety by United States District Judge Dean Whipple in his ORDER. Dean Whipple, basing his conclusion on the contents of the REPORT AND RECOMMENDATION, and on a misguided *Terry* rationale refused to suppress either the crack cocaine or defendant's statements to the police. Both Judge Hamilton's REPORT AND RECOMMENDATION and Judge Whipple's ORDER were adopted by the Honorable D. Brook Bartlett, the trial Judge who twice tried the case and twice refused to suppress either the evidence of the drugs or the statements of the defendant.

The Eighth Circuit Court of Appeals, largely for the reasons given by Judge Hamilton and Judge Whipple, affirmed the Court below. In a brief, unpublished opinion, the Eighth Circuit said the following:

> "In brief, defendant McGee was stopped, and shortly thereafter placed under arrest, when he was returning to a house in Kansas City at which a

> search warrant was then being executed. The vehicle that the defendant was driving had been seen in the vicinity of the house on several occasions during the two week period preceding the search. The search warrant was based on information that the house was the center of drug activity, and the validity of the warrant is not contested. WE BELIEVE THAT IT WAS REASONABLE FOR THE OFFICERS WHO WERE CONDUCTING THE SEARCH TO STOP THE VEHICLE AND IMMOBILIZE ITS DRIVER IN ORDER TO PROTECT THEMSELVES FROM POSSIBLE VIOLENCE WHILE THEY WERE CARRYING OUT THE AUTHORIZED SEARCH." (emphasis added)

In coming to the above-quoted conclusion the Eighth Circuit so far departed from the accepted and usual course of judicial proceedings or, in the alternative, sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

B. THE QUESTION WHETHER, WITHOUT MORE, A "CHASE CAR" SHOULD BE ALLOWED TO STOP ANY VEHICLE ASSOCIATED WITH A SUSPECTED DRUG HOUSE WHILE POLICE ARE CONDUCTING A SEARCH OF THE SUSPECTED DRUG HOUSE UNDER AUTHORITY OF A SEARCH WARRANT EVEN THOUGH THE POLICE DO NOT KNOW THE IDENTITY OF THE VEHICLE'S DRIVER AND EVEN THOUGH THE DRIVER IS COMMITTING NO CRIME WHEN APPROACHING THE SUSPECTED DRUG HOUSE DURING THE COURSE OF THE SEARCH IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In *Michigan v. Summers*, 452 U.S. 692 (1981) this Court held that for Fourth Amendment purposes, a warrant to

search for contraband, founded on probable cause, implicitly carried limited authority to detain the occupants of the premises while a search of the premises was conducted. In the *Summers* case the defendant was descending the front steps of his house when Detroit Police Officers arrived to execute a warrant to search his house for narcotics. They requested his assistance in gaining entry and detained him while they searched the premises. After finding narcotics in the basement and ascertaining that defendant owned the house, the police arrested him, searched his person, and found in his coat pocket an envelope containing 8.5 grams of heroin. The dispositive question was whether defendant's initial detention violated his constitutional right to be secure against an unreasonable seizure of his person. In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, this Court indicated that both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. This Court said:

> "Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, BUT SOMETIMES OF GREATER IMPORTANCE, is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both police and the occupants is minimized if the officers routinely exercise unquestioned

command of the situation. 452 U.S. @ 702, 703." (emphasis added)

THIS COURT HAS NEVER GONE SO FAR AS TO SAY THAT "THE INTEREST IN MINIMIZING THE RISK OF HARM TO THE OFFICERS" AUTHORIZES THE STOPPING OF A VEHICLE ASSOCIATED WITH A SUSPECTED DRUG HOUSE DURING THE COURSE OF A SEARCH PURSUANT TO WARRANT . . . ESPECIALLY WHERE NONE OF THE OFFICERS KNEW WHO WAS DRIVING THE VEHICLE AND WHERE THE VEHICLE WAS STOPPED ON A PUBLIC STREET COMPLETELY OFF OF THE PREMISES OR ITS APPURTENANCES!

The lower courts were wrong in relying to any extent whatsoever on the *Terry v. Ohio* "stop and frisk" doctrine. No one ever claimed to have a "reasonable articulable suspicion" of any wrongdoing on the part of the vehicle. The vehicle's driver had not yet been identified at the time of the stop. He certainly should not have been suspected of being involved in criminal activity at the time of the stop!

The lower court's extension of *Michigan v. Summers* and/or its finding of "reasonableness" under these facts has created an important question of federal law which has not previously been, but should be, settled by this Court.

VI.

CONCLUSION

This case presents an important constitutional issue regarding the exact boundaries of the *Michigan v.*

Summers decision as well as the utilization of the "public safety" doctrine while interpreting the Fourth Amendment "reasonableness" requirement. The court below was wrong in relying to any extent on the "stop and frisk" doctrine espoused in *Terry v. Ohio*. This Court has an opportunity to clarify not only the limits and boundaries of *Michigan v. Summers* but also the extent to which the "public safety" or "police safety" rationale impacts upon the reasonableness requirement of the Fourth Amendment. Please issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal
	)	Action No.
v.	)	88-00099-01-
	)	CR-W-1
MICHAEL R. MC GEE,	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATION

(Filed July 18, 1988)

On June 15, 1988, the defendant, by and through counsel, filed a motion to suppress physical evidence seized April 26, 1988, from a brown-over-black 1979 Chevrolet Blazer and to suppress all statements made by the defendant to police on or after April 26, 1988. In the suggestions in support of his motion the defendant asserts, essentially, as follows:

1. Neither the seizure of the defendant nor the search of his vehicle occurred pursuant to a warrant or was otherwise premised on probable cause;
2. The seizure of the defendant by the police officers who stopped his vehicle and restricted his motion is subject to the reasonableness requirements of the Fourth Amendment; and
3. There are no facts from which a reasonable suspicion can be rationally inferred that the defendant had been, was, or was about to

engage in criminal activity; thus, the circumstances of the stop cannot meet the standard of *Terry* v. *Ohio*, 392 U.S. 1 (1968).

On June 17, 1988, the undersigned conducted an evidentiary hearing on the defendant's motion to suppress evidence. The defendant appeared in person and by retained counsel, Larry A. Schaffer. The Government appeared by Assistant United States Attorney Anita L. Mortimer. The evidence consisted of P. Exhibit A, a Miranda Waiver signed by the defendant, and the testimony of the following witnesses:

1. Detective Charles Michael McKinnie (hereafter "McKinnie"), Kansas City, Missouri, Police Department;
2. Officer Gregory J. Pelter (hereafter "Pelter"), Kansas City, Missouri, Police Department; and
3. Officer William Wranich (hereafter "Wranich"), Kansas City, Missouri, Police Department.

On June 22, 1988, the defendant, by and through counsel, filed supplemental suggestions in support of his motion to suppress evidence. In his supplemental suggestions, the defendant elaborated on his assertion that he was stopped without reasonable suspicion of his involvement in criminal activity and amended his original motion to include the allegation that he was arrested, not merely stopped, and that he was arrested without sufficient probable cause.

On June 22, 1988, counsel for the Government filed "Government Submission Regarding Motion to Suppress," stating, in essence, as follows:

1. It was essential for the safety of officers conducting the search of the residence in front of which the defendant was stopped, the safety of the usual occupants of the residence, and the safety of bystanders that persons approaching the residence during the search be stopped prior to any chance of their interference or attempted interference with searching officers;

2. Once the vehicle was stopped, the defendant's sudden movement and attempt to open the console justified his immediate removal from the vehicle and inspection of the console for potential weapons; and

3. The stop of the defendant was also justified based upon a reasonable suspicion as required by *Terry* v. *Ohio*, 392 U.S. 1 (1968).

During the evidentiary hearing, counsel for the defendant stated that his theory upon which he bases that portion of his motion pertaining to the suppression of statements does not rely on any *Miranda* violations or on issues of voluntariness of the statements, but relies solely on the allegation that the statements resulted from an illegal arrest (Tr. at 56). Counsel for the Government conceded that the stop of the vehicle was not a traffic stop (Tr. at 34).

On the basis of the evidence adduced at the evidentiary hearing, the undersigned submits the following proposed findings of fact:

1. For a period of at least two weeks prior to April 26, 1988, surveillance was conducted on the house at 4012 Clark, Kansas City, Missouri (hereafter the "house") (Tr. at 4). During that surveillance, a brown and black

1979 Chevrolet Blazer (hereafter the "vehicle") was frequently seen at the house (Tr. at 4-5). Primarily the defendant, but also other occupants of the house, were observed using the vehicle (Tr. at 5, 70). The defendant was identified as an occupant of the house or at least a current frequent visitor to the house (Tr. at 6, 63). Prior to April 26, 1988, the defendant was observed leaving and coming to the house numerous times (Tr. at 52). Occupants of the house, including the defendant, had been identified as being from Englewood, California, and as being members of the Bloods, a Los Angeles street gang (Tr. at 5-7, 62, 65). Intelligence information revealed that members of Los Angeles street gangs were known to be armed, involved in street violence, prone to "drive-by" shootings, and dealing in large quantities of cocaine, and that narcotics were being prepared in the house (Tr. at 7, 52, 65). On April 26, 1988, a search warrant was executed at the house at approximately 9:15 p.m., by officers of the Kansas City, Missouri, Police Department (Tr. at 62, 67);

2. Approximately twenty to thirty minutes prior to the execution of the search warrant at the house, the vehicle, which had been parked on the street in front of the house, was driven away from the house (Tr. at 7-8). the searching officers had been in the house approximately fifteen minutes when the vehicle returned to the residence (Tr. at 8). Wranich was parked in a parking lot on Clark Street just north of the intersection of 39th Street and Clark Street when he heard radio transmissions regarding the progress of the vehicle from somewhere in Kansas City, Kansas, transmitted by police officers

tailing the vehicle (Tr. at 104, 112). The officers tailing the vehicle suspected that the vehicle was heading toward Wranich's location on its way to the house (Tr. at 110, 113). Wranich received the information that the vehicle was eastbound on 40th Street, and the officers tailing it were concerned that the vehicle would turn into an alley behind the house (Tr. at 114). Instructions transmitted over the radio were that if the vehicle drove by the house it was to be stopped, and the driver was to be detained and identified and arrested if necessary (Tr. at 75-76, 114-115);

3. Wranich proceeded southbound on Clark Street to the 40th Street intersection, where he observed the vehicle approach the intersection from the west and turn south onto Clark Street (Tr. at 104). Wranich turned on his grill lights, spotlight, and siren to stop the vehicle, and the vehicle stopped in the driving lane of Clark Street in front of the house (Tr. at 32, 97, 104-105, 116). Wranich approached the vehicle on the driver's side with his handgun drawn, and his partner, Timothy Smith, approached the vehicle on the passenger side with a shotgun (Tr. at 105, 117). In Wranich's mind, the defendant was to be detained until Wranich was assured the defendant was not going to go anywhere near the house (Tr. at 127-128);

4. Pelter was inside the house assisting in the execution of the search warrant when he heard a radio transmission that the vehicle was returning to the house (Tr. at 67). Pelter went out onto the front porch and down the steps to the front yard (Tr. at 67, 81). The house sits on a hill with an incline down to Clark Street about four feet in height (Tr. at 69). Pelter saw the vehicle parked in the driving lane of Clark Street in front of the

house and Wranich and Smith with their guns drawn, one on each side of the vehicle (Tr. at 68, 76-77, 97). Wranich told the defendant, who was driving the vehicle, to put his hands where Wranich could see them, and the defendant put both his hands up (Tr. at 105). The defendant brought his right hand down to the console between the two front bucket seats, bent his hand down at the wrist with the fingers curled under, and grabbed the front of the console, trying to open the latch (Tr. at 69, 78-79, 105). Pelter and Wranich thought the defendant was reaching for a gun (Tr. at 69, 106-107). Due to the height of the vehicle, Wranich could only see that portion of the defendant's body from the chest upward (Tr. at 106);

5. When Pelter saw the defendant's right hand trying to open the console, he turned to the north and ran down the driveway of a neighboring residence in order to approach the vehicle from the rear without being in the line of fire (Tr. at 84-87). Wranich pointed his revolver at the defendant, told the defendant to get out of the vehicle, and opened the door of the vehicle (Tr. at 106). The defendant got out of the vehicle (Tr. at 106, 120). Wranich placed the defendant's hands on the vehicle and frisked the defendant (Tr. at 106, 125); and

6. Pelter entered the vehicle and opened the console (Tr. at 69). The console had a "tough latch," it stuck, and it was not easy to open (Tr. at 80). Pelter found two clear plastic bags containing a beige rock substance in the console (Tr. at 69). No gun was found in the vehicle or on the defendant's person (Tr. at 90).

It is well established in the Eighth Circuit that, in a federal trial, the legality of a search and seizure by state officers is to be judged as if it were made by federal officers. *United States* v. *Ross*, 713 F.2d 389, 393 n.7 (8 Cir. 1983); *United States* v. *Montgomery*, 708 F.2d 343, 344 (8 Cir. 1983); *United States* v. *Eng*, 753 F.2d 683, 686 (8 Cir. 1985). Therefore, the search challenged in this criminal action shall be regarded as a federal search.

Under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny, a citizen may be temporarily seized where the officer making the seizure has knowledge of specific and articulable facts, and the inferences therefrom, which create a reasonable suspicion that criminal activity is afoot.

A dual inquiry determines the reasonableness of an investigative stop: whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *United States* v. *Doffin*, 791 F.2d 118, 120 (8 Cir.), *cert. denied*, 107 S.Ct 210 (1986); *Terry* v. *Ohio*, 392 U.S. 1, 19-20 (1968). The minimal standard of articulable justification required by the Fourth Amendment for an investigative stop is whether the police officers were aware of particularized, objective facts which, taken together with the rational inferences from those facts, reasonably warranted suspicion that a crime was being committed. *United States* v. *Jones*, 759 F.2d 633 (8 Cir. 1985), *cert. denied* ___ U.S. ___, 106 S.Ct. 113; *United States* v. *Martin*, 706 F.2d 263, 265 (8 Cir. 1983); *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981); *see also*, *Terry* v. *Ohio*, 392 U.S. at 21. Under these limited circumstances, law enforcement officers, without a warrant, may stop a

motor vehicle for investigative purposes. *United States* v. *Williams*, 714 F.2d 777, 779 (8 Cir. 1983). A district court's determination as to the existence of sufficient justification is to be reviewed under the "clearly erroneous" standard. *United States* v. *Jones* 759 F.2d at 637 n.3; *United States* v. *Martin*, 706 F.2d at 265.

Regarding the first part of the dual inquiry, reasonable, articulable suspicion must exist as of the initial moment of seizure, but is to be evaluated in light of the observations of the involved officers taken as a whole. *United States* v. *Jones*, 759 F.2d at 642; *United States* v. *Wallraff*, 705 F.2d 980, 988 (8 Cir. 1983). Acts which are innocent in and of themselves may take on more significance when considered together. *United States* v. *Jones*, 759 F.2d at 642; *Terry* v. *Ohio*, 392 U.S. at 21. The Court may take into account any added meaning certain conduct might appear to suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. *United States* v. *Jones*, 759 F.2d at 642-643; *United States* v. *Wallraff*, 705 F.2d at 988. It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt; however, the officers must be acting on facts directly relating to the suspect or the suspect's conduct and not just on a "hunch" or on circumstances which describe a very broad category of predominantly innocent persons. *United States* v. *Jones*, 758 F.2d at 643.

As to the second part of the dual *Terry* inquiry, the proper scope of an investigative detention depends upon the purposes of the stop and requires using the least intrusive means reasonably available to achieve those

purposes. *United States* v. *Doffin*, 791 F.2d at 120; *United States* v. *Jones*, 758 F.2d at 642; *Florida* v. *Royer*, 460 U.S. 491, 500 (1983). Officers may check for weapons if they reasonably believe the suspects are armed. *United States* v. *Doffin*, 791 F.2d at 120; *Terry* v. *Ohio*, 392 U.S. at 24. The officers may take such additional steps as are reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. *United States* v. *Doffin*, 791 F.2d at 120; *United States* v. *Hensley*, 469 U.S. 221, 235 (1985). An action tantamount to arrest has taken place if the officers' conduct is more intrusive than necessary for the limited purposes of the investigative stop. *United States* v. *Doffin*, 791 F.2d at 120; *United States* v. *Rose*, 731 F.2d 1337, 1342 (8 Cir. 1984), *cert. denied*, 469 U.S. 931. A possibility that the suspect was armed or an attempt by the suspect to evade detention frequently is emphasized or even deemed essential to make a police officer's show of guns reasonable. *United States* v. *Jones*, 758 F.2d at 638.

Based upon surveillance of the house for approximately two weeks prior to the execution of the search warrant and upon intelligence information compiled with regard to the operations at the house and the parties involved therein, the officers knew that narcotics were being trafficked through the house, that the occupants of the house, including the defendant, were associated with a violent Los Angeles street gang whose members were known to carry guns and traffic in narcotics, and that the vehicle driven by the defendant was associated with the house. The officers had a reasonable and articulable suspicion that the defendant was engaged in the illegal activity that was associated with the house and was

returning to the house at the time he was stopped. In light of the foregoing circumstances, the officers were justified in stopping the defendant for the safety of themselves and the searching officers and other persons who were at that time in the house.

When the officers observed the defendant trying to open the console between the two front seats of the vehicle after he had been told to put his hands up, they were justified in thinking that the defendant might be reaching for a weapon. By removing the defendant from the vehicle and frisking him, the officers used reasonable means to protect themselves in the event the defendant was armed.

Where an investigative stop is justified, a police officer may make a protective search of the passenger compartment of the vehicle in which the suspect was driving, but the search is limited to areas in which a weapon may be placed or concealed, if the officer has a reasonable belief, based on specific and articulable facts and inferences drawn therefrom, that the suspect whom the officer confronts is dangerous and may gain immediate control of weapons. *United States* v. *Denney*, 771 F.2d 318, 321 (7 Cir. 1985); *Michigan* v. *Long*, 463 U.S. 1032, 1049-1050 (1983).

As discussed above, the officers were justified in stopping the defendant. Further, the defendant's action of reaching for and trying to open the console, coupled with the officers' knowledge of the defendant's gang affiliation, and the activities in the house, are specific and articulable facts from which the officers might conclude

that the defendant was dangerous and might gain immediate access to control of weapons.

The defendant bases his challenge to the admissibility of any statements solely upon his assertion that his arrest was illegal. This assertion is without merit. The detention of the defendant did not ripen into an arrest until the officers had found the cocaine in the console and placed the defendant under arrest.

It is

RECOMMENDED that the Court, after making an independent review of the record and the applicable law, enter an order denying Defendant Michael R. McGee's motion to suppress evidence and statements.

Counsel are requested to file and serve any specific objections to this report and recommendation on or before July 22, 1988. A failure to file and serve timely objections shall bar an attack on appeal of the factual findings in the report which are accepted or adopted by the district judge except upon the ground of plain error or manifest injustice.

/s/ Calvin K. Hamilton
CALVIN K. HAMILTON
Chief United States
Magistrate

Kansas City, Missouri
July 18, 1988

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	No. 88-00099-01-CR-W-1
MICHAEL R. McGEE, Defendant	)	

ORDER

(Filed July 26, 1988)

Before the court is defendant's motion, filed June 15, 1988, to suppress physical evidence seized April 26, 1988, from a 1979 Chevrolet Blazer and to suppress all statements made by the defendant to police on or after April 26, 1988. Chief Magistrate Calvin K. Hamilton conducted an evidentiary hearing on the motion on June 17, 1988. Defendant filed supplemental suggestions in support of the motion on June 22, 1988. The chief magistrate issued a report July 18, 1988, recommending that the motion be denied. Defendant filed objections to the report and recommendation July 22, 1988. The objections reassert the arguments in the motion and supplemental suggestions, and reiterate defendant's contention that there were no reasonable articulable facts to support the police officers' detention of the defendant.

Upon thoroughly reviewing the record and applicable law, as set forth in the chief magistrate's report and

recommendation, the court must conclude that the evidence should not be suppressed. The defendant's objections to the report essentially are threefold: (1) The police officers at the suppression hearing did not testify that they stopped the defendant because they had a reasonable suspicion that a crime was committed. (2) The police knew no more about possible illegal activity involving the defendant when he arrived at the house being searched than they did when he had left about 20 or 30 minutes before the search began. (3) If police actually stopped the defendant because they were concerned for their safety as he approached the house, they could have arrested him while he was away from the house.

These objections cannot stand when viewed in the context of the facts. First, there was evidence that a search warrant had been issued, and no challenge was raised by the defendant against the underlying probable cause to believe that evidence or fruits of crime would be found there. There also was evidence that the defendant either occupied or frequented the house which was searched. Such specific articulable facts support a reasonable belief that criminal activity was afoot, and justify at least a brief detention of the defendant pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). As discussed in the report and recommendation, the sudden movement toward the console in the car justified the further intrusion of removing the defendant from his car with a show of weapons.

Second, if the police had sufficient justification to stop the defendant before the house was searched, they still had such justification to stop the defendant after the search began. The delay in stopping the defendant cannot be said to diminish the justification. If anything, the

police were less intrusive by refraining from stopping the defendant until later, when the safety of the officers became a concern.

Third, defendant's argument that he should have been arrested away from the house, if the police truly had a legitimate concern for safety rather than a pretext, undercuts itself. If the police were to arrest the defendant when he was away from the house, they could not justify it as a safety measure because he certainly posed no threat to the searching officers. Rather, the defendant only became a threat to the searching officers when he returned to the house. Stopping the defendant and removing him from his car at gunpoint were, under the circumstances, reasonable safety precautions. The police had probable cause to believe drug trafficking had been occurring at the searched house. They knew that the defendant had a close relationship to the house, and that the defendant was apparently affiliated with a street gang known to use "drive-by" violence. Furthermore, firearms are known "tools of the trade" of narcotics dealing because of the dangers inherent in that line of work. *United States v. Simon*, 767 F.2d 524, 527 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 545; *United States v. Milham*, 590 F.2d 717, 721 (8th Cir. 1979), *cert. denied*, 429 U.S. 820.

Upon making an independent review of the applicable law and the record, the court adopts in the entirety the chief magistrate's proposed findings of facts and conclusions of law and incorporates them herein by reference. For the reasons set forth in the report and recommendation, and those discussed above, the motion will be denied.

It is

ORDERED that the defendant's motion, filed June 15, 1988, to suppress physical evidence and statements is denied.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATE
DISTRICT JUDGE

DATED: JULY 26, 1988.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1177

United States of America,	*
	*
Appellee,	* On Appeal from the United
v.	* States District Court
	* for the Western District
Michael R. McGee,	* of Missouri.
Appellant.	*
	*

Submitted: September 14, 1989

Filed: October 6, 1989

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

PER CURIAM

Defendant Michael R. McGee has been convicted of possessing a mixture containing cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(A) (iii). McGee moved to suppress evidence that had been seized at the time of his arrest. An evidentiary

hearing was held before a magistrate,[1] and he recommended that the motion be denied. The District Court[2] accepted the magistrate's report and recommendation and entered an order denying the motion to suppress. At trial, the objection embodied in the motion to suppress was renewed, and the District Court[3] again denied the motion. Defendant was convicted, and he now appeals.

The question before us is whether the motion to suppress should have been granted. We affirm, largely for the reasons given by Judge Hamilton and Judge Whipple. In brief, defendant McGee was stopped, and shortly thereafter placed under arrest, when he was returning to a house in Kansas City at which a search warrant was then being executed. The vehicle that the defendant was driving had been seen in the vicinity of the house on several occasions during the two week period preceding the search. The search warrant was based on information that the house was a center of drug activity, and the validity of the warrant is not contested. We believe that it was reasonable for the officers who were conducting the search to stop the vehicle and immobilize its driver in order to protect themselves from possible violence while they were carrying out the authorized search.

We do not believe that any precedential purpose would be served by further details with respect to the

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[1] The Hon. Calvin K. Hamilton, Chief United States Magistrate for the Western District of Missouri.

[2] The Hon. Dean Whipple, United States District Judge for the Western District of Missouri.

[3] The Hon. D. Brook Bartlett, United States District Judge for the Western District of Missouri.

particular fact situation involved in this case, and we therefore forego the filing of a full written opinion. The judgment of the District Court is

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.